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## Trivial Rights

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# Propter Honoris Respectum

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## Trivial Rights

*Philip A. Hamburger\**

In the summer of 1789, when the House of Representatives was formulating the amendments that became the Bill of Rights, Theodore Sedgwick of Massachusetts argued against enumerating the right of assembly. The House, he urged, “might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper . . . [Was] it necessary to list these trifles in a declaration of rights, under a Government where none of them were intended to be infringed”?<sup>1</sup>

Two centuries later, some scholars have quoted Sedgwick’s comments and some other late eighteenth century discussions of “trivial” rights as evidence that early Americans recognized unwritten rights. For example, Terry Brennan has quoted Sedgwick’s remarks to illustrate that “[t]he Founders believed that natural rights were superior to positive law and the Constitution” and that the judiciary had power “to vindicate” such rights.<sup>2</sup> Gene Nichol has also quoted Sedgwick as evidence of “non-textual constitutional rights,” arguing that “[j]ust because the Bill of Rights chooses not to protect trivial interests does not mean . . . that no trivial rights exist.”<sup>3</sup> With greater caution, Randy Barnett has emphasized that

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1 CREATING THE BILL OF RIGHTS 159-60 (Helen E. Veit et al. eds., 1991) (statement of Theodore Sedgwick, Aug. 15, 1789). Sedgwick also argued: “[I]t is certainly a thing that never would be called in question . . .” *Id.* at 159.

2 Terry Brennan, *Natural Rights and the Constitution: the Original “Original Intent”*, 15 HARV. J.L. & PUB. POL’Y 965, 969 (1992); see also 1014-15. For his quotation of Sedgwick, see *id.* at 1013.

3 Gene R. Nichol, *Children of Distant Fathers: Sketching an Ethos of Constitutional Liberty*, 1985 WIS. L. REV. 1305, 1314-15; see also *id.* at 1305-16. For his quotation from

"the text does not provide judges with specific guidance" about unenumerated rights, but noting Sedgwick's animadversions, Barnett argues that some specific unenumerated rights are judicially enforceable because they were intended by the framers and ratifiers. In addition, he argues that other unenumerated rights can be protected by our adopting "a justificatory *presumption of liberty* that puts the burden on government to show that any interference with . . . the rights retained by the people is justified."<sup>4</sup>

This scholarship that briefly touches upon trivial rights is part of a much more extensive literature on unenumerated rights, which takes for granted that unenumerated rights were unwritten and, indeed, in some tension with the written constitution adopted by the people.<sup>5</sup> Perhaps disappointed by the brief enumeration of rights in the U.S. Constitution, many scholars have struggled to find other or broader rights either through expansive interpretation of the relatively few rights specifically mentioned there or through theories about unwritten rights. In so doing, large numbers of these scholars assume that unenumerated rights were not identified by the written constitution and in this sense were unwritten. They also seem to assume that these unwritten rights were in conflict with the written constitution—a conflict they harmonize by interpreting the Ninth Amendment to have referred to such

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Sedgwick, see *id.* at 1313.

4 Randy E. Barnett, *Foreword: Unenumerated Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 627-30 (1991). Unlike some other scholars who have discussed trivial rights, Professor Barnett frequently appears to distinguish his proposals from the history, yet even he reveals an inclination to reify unenumerated rights. See *infra* note 13; see also Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. CIN. L. REV. 49, 83-84 (1992).

5 See *supra* notes 2, 3 & 4; see also JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 34-41 (1980); BENNET B. PATTERSON, *THE FORGOTTEN NINTH AMENDMENT* 51-56 (1955); Randy E. Barnett, *Foreword: The Ninth Amendment and Constitutional Legitimacy*, 64 CHI-KENT L. REV. 37, 56-64 (1988); Charles Black, *On Reading and Using the Ninth Amendment*, in *POWER AND POLICY IN QUEST OF LAW: ESSAYS IN HONOR OF EUGENE VICTOR ROSTOW* 187 (Myres S. McDougal & W. Michael Reisman eds., 1985); Edward S. Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 152-53 (1928); Thomas C. Grey, *The Uses of an Unwritten Constitution*, 64 CHI-KENT L. REV. 211, 212 (1988); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 CHI-KENT L. REV. 131, 134-35 (1988); Norman Redlich, *Are There "Certain Rights . . . Retained by the People"?*, 37 N.Y.U. L. REV. 787 (1962); Lawrence G. Sager, *You Can Raise the First, Hide Behind the Fourth, and Plead the Fifth. But What On Earth Can You Do With the Ninth Amendment?*, 64 CHI-KENT L. REV. 239, 241 (1988); Suzanna Sherry, *The Ninth Amendment: Righting and Unwritten Constitution*, 64 CHI-KENT L. REV. 1001, 1001 (1988); Suzanna Sherry, *The Founder's Unwritten Constitution*, 54 U. CHI. L. REV. 1127 (1987).

unwritten, unenumerated rights.<sup>6</sup> From this perspective, unwritten rights could trump the positive law of the Constitution.

Ironically, by assuming that unenumerated rights were unwritten and in tension with the text, modern advocates of unenumerated rights have rejected the Constitution's written foundation for unenumerated rights. As is well known, the framers of the Constitution and the advocates of its ratification, the Federalists, opposed an enumeration of rights on the ground that rights were better protected by an enumeration of powers. They assumed that by enumerating federal powers, the people would remain free from the federal government in other respects and thereby would retain innumerable many rights. Thus, the people's unenumerated rights were not unwritten, for they were reserved by the Constitution's grant of powers to the federal government. In the language of the Ninth Amendment, the rights retained by the people were those reserved to the people by the Constitution—if not through an enumeration of rights, then at least through an enumeration of powers.<sup>7</sup>

In taking for granted that the unenumerated rights retained by the people were those generally reserved by the writing, the framers and Federalists did not doubt that there were also other, largely unwritten protections for rights, but they typically understood these other protections to be not so much legal as structural, political, social and cultural. Although several of these unwritten protections were widely discussed, only one, the people's virtue or spirit of liberty, will be examined here, because it was the one Federalists employed in their analysis of trivial rights. Federalists argued that the people's virtue or spirit of liberty would be far

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6 See *supra* note 5; see also Brennan, *supra* note 2, at 1014-19; Nichol, *supra* note 3, at 1315; Barnett, *supra* note 4, at 629; Randy E. Barnett, *Introduction: James Madison's Ninth Amendment in* RANDY E. BARNETT, *THE RIGHTS RETAINED BY THE PEOPLE—THE HISTORY AND MEANING OF THE NINTH AMENDMENT* 18 (1989) [hereinafter Barnett, *Ninth Amendment*]. See generally *id.* at 1-49.

7 See, e.g., Raoul Berger, *The Ninth Amendment*, 66 CORNELL L. REV. 1 (1980); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 271 (1988); William Van Alstyne, *Slouching Toward Bethlehem with the Ninth Amendment*, 91 YALE L.J. 207 (1981) (reviewing CHARLES BLACK, *DECISION ACCORDING TO LAW* (1981)). For reasons of convenience, this essay follows the convention of distinguishing between "rights" and "powers"—that is, the rights of individuals and the powers of the federal government.

To the extent some framers and ratifiers assumed that there were unwritten reservations of rights against the federal government, they typically assumed that such powers and rights were those implied by the writing or by the structure or character of the government it established.

more important for the preservation of rights than any written protection. In contrast to Anti-Federalists, who tended to assume that any right not enumerated was lost, Federalists argued that even enumerated rights would be preserved only while the spirit of liberty remained strong—that paper protections were of little use in the absence of the cultural and political conditions conducive to freedom.

These written and unwritten protections for unenumerated rights form the context in which trivial rights should be understood. When Anti-Federalists demanded the enumeration of the rights they considered essential for the protection of liberty, Federalists mocked their opponents for seeking the enumeration of rights Federalists considered unlikely to be infringed. There was no reason to fear for the rights that concerned Anti-Federalists if Americans had not granted power over such rights and, moreover, were vigilant of their liberty. On these grounds, many Federalists viewed as trivial the rights Anti-Federalists said it was essential to enumerate. Such rights were “trivial” in the sense that they did not require or deserve the specific protection that came with enumeration.

Yet Federalists did not thereby suggest that the rights Anti-Federalists sought to enumerate were undesirable or unworthy of protection. On the contrary, many of these rights would, to some extent, be protected by the enumeration of powers—by the general reservation of undifferentiated rights. Moreover, the rights of the people, enumerated or not, depended less upon the Constitution’s paper reservation of rights than upon the various structural, political, social and cultural constraints on government. Such constraints—not least, the people’s virtue or spirit of liberty—would be the most substantial protection for rights and would preserve freedom even from federal authority. On these assumptions, Federalists argued that innumerable unenumerated rights were already protected—both by the written grant of powers and, more substantially, by the people themselves. Two hundred years after Federalists mocked their opponents for seeking to enumerate “trivial” rights, their taunts remain sharp reminders as to how the framers and Federalists assumed our unenumerated rights would be protected.<sup>8</sup>

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8 Of course, this is not to say that trivial rights are the only lens through which the Constitution’s treatment of unenumerated rights can be examined. The enumeration of powers, the Bill of Rights, judicial review and the Ninth and Tenth Amendments,

## I. FEDERALISTS ON THE DANGER OF AN INCOMPLETE ENUMERATION OF RIGHTS

Before turning to trivial rights, this essay must examine the concerns of the framers and Federalists about enumeration, for their fears about enumeration were the basis upon which they developed their conception of trivial rights. When Anti-Federalists demanded amendments enumerating rights, Federalists were adamantly opposed. They suspected that the proposed amendments would be used to prevent ratification of the Constitution and that at least some of the amendments would deprive the new federal government of its efficacy. Yet these were not the only Federalist objections. Federalists also questioned the value of an enumeration of rights as a means of protecting rights. Distrustful of enumeration, the framers and Federalists sought to protect rights by enumerating powers.<sup>9</sup>

Federalists argued that an enumeration of rights would be dangerous because it was impossible to specify all of the rights held against the federal government. For example, with regard to the rights of individuals, James Iredell argued: "A bill of rights . . . would . . . be . . . dangerous. No man, let his ingenuity be what it will, could enumerate all the individual rights not relinquished by this Constitution."<sup>10</sup> Speaking of the rights of the states against the federal government, Governor Bowdoin of Massachusetts observed that "[t]he rights of particular States . . . would require a volume to describe them, as they extend to every subject of legislation, not included in the powers vested in Congress."<sup>11</sup> In other

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among other subjects, also offer useful perspectives on unenumerated rights. For some important and illuminating discussions, see, e.g., Kay, *supra* note 7, at 271; Walter Berns, *Judicial Review and the Rights and Laws of Nature*, 1983 SUP. CT. REV. 49; Thomas B. McAfee, *The Original Meaning of the Ninth Amendment*, 90 COLUM. L. REV. 1215, 1249-59 (1990); Arthur E. Wilmarth, Jr., *The Original Purpose of the Bill of Rights: James Madison and the Founders' Search for a Workable Balance Between Federal and State Power*, 26 AM. CRIM. L. REV. 126 (1989). Note that these articles shed light on the structure of government and other protections for liberty that were not discussed directly in connection with trivial rights.

9 Federalist concerns about enumeration have been discussed by a substantial number of scholars. For examples of different perspectives, see Barnett, *supra* note 4, at 626; Massey, *supra* note 4, at 83-87; McAfee, *supra* note 8, at 1249-59.

10 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 149 (Jonathan Elliot ed., 1941) [hereinafter ELLIOT'S DEBATES] (statement of James Iredell at N.C. Rat. Convention, July 28, 1788).

11 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 290 n.15 (John P. Kaminski & Gaspare J. Saladino eds., 1986) [hereinafter DOCUMENTARY HIS-

words, the freedom of individuals or states was so extensive it could not practicably be reduced to a list of particulars.<sup>12</sup>

For individuals, the innumerable and therefore unenumerable rights most prominently included natural rights. Many modern scholars reify natural rights and talk about them as if they were somehow enforceable as such.<sup>13</sup> Eighteenth-century Americans, however, tended to discuss their natural rights as portions of their natural liberty—as portions of the general freedom of individuals in the state of nature. This freedom of individuals in the absence of government was what Americans generically described as “life, liberty and property” or, sometimes, as “life, liberty and the pursuit of happiness.”<sup>14</sup> Some of this freedom was said to be sacri-

TORY) (editors and publication dates vary from volume to volume) (statement of James Bowdoin at Mass. Rat. Convention, January 23, 1788). More generally, Bowdoin said:

The rights of particular States and private citizens not being the object or subject of the Constitution, they are incidentally mentioned . . . in regard to the latter, as all government is founded on the relinquishment of personal rights in a certain degree, there was a clear impropriety in being very particular about them.

*Id.*

<sup>12</sup> Alexander Contee Hanson wrote:

I apprehend, that a bill of rights might not be this innocent quieting instrument. Had the convention entered on the work, they must have comprehended within it every thing, which the citizens of the United States claim as a natural or a civil right. An omission of a single article would have caused more discontent, than is either felt, or pretended, on the present occasion.

ARISTIDES [ALEXANDER CONTEE HANSON], REMARKS ON THE PROPOSED PLAN OF A FEDERAL GOVERNMENT, (January 31, 1788), reprinted in 15 DOCUMENTARY HISTORY, *supra* note 11, at 537. In response to Anti-Federalist claims that the framers had already risked a bill of rights, Jasper Yeates argued:

But it is asked, as some rights are here expressly provided for, why should not more? In truth, however, the writ of *habeas corpus* and the trial by jury in criminal cases cannot be considered as a bill of rights, but merely as a reservation on the part of the people and a restriction on the part of their rulers; and I agree with those gentlemen who conceive that a bill of rights, according to the ideas of the opposition, would be accompanied with considerable difficulty and danger; for, it might be argued at a future day by the persons then in power—you undertook to enumerate the rights which you meant to reserve, the pretension which you now make is not comprised in that enumeration, and consequently, our jurisdiction is not circumscribed.

<sup>2</sup> DOCUMENTARY HISTORY, *supra* note 11, at 437 (statement of Jasper Yeates at Pa. Rat. Convention, Nov. 30, 1787).

<sup>13</sup> Barnett, *supra* note 4, at 624-40; Brennan, *supra* note 2, at 1014-19; Nichol, *supra* note 3, at 1315; see also Barnett, *Ninth Amendment*, *supra* note 6, at 18. See generally *id.* at 1-49.

<sup>14</sup> For some illustrations, see Philip A. Hamburger, *Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295,

ficed to government to enable it to provide protection for the remainder, the protection of this remaining freedom being the object or end of government. Thus, when lecturing on the formation of government, the President of Princeton, John Witherspoon, observed that "[t]he rights of subjects in a social state cannot be enumerated, but they may be all summed up in *protection*, that is to say, those who have surrendered part of their natural rights expect the strength of the public arm to defend and improve what remains."<sup>15</sup> Another American of Scottish origin, James Wilson, remarked that not even the varied tomes on natural law completely enumerated the rights of men:

Is it a maxim in forming governments, that not only all the powers which are given, but also that all those which are reserved, should be enumerated? I apprehend, that the powers given and reserved form the whole rights of the people as men and as citizens. I consider that there are very few who understand the *whole* of these rights. All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights, appertaining to the people as men and as citizens.<sup>16</sup>

Shortly later, he expostulated: "Enumerate all the rights of men! I am sure, sir, that no gentleman in the late Convention would have attempted such a thing."<sup>17</sup>

To preserve innumerable many rights from the power of the federal government—to avoid limiting freedom to such rights as could be listed—the framers left most rights to be defined by the enumeration of federal powers. The Constitution, explained Feder-

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304. In Lockean terms, all of these could be summed up simply as "property." JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 395 (Il.ix.123) (1963). For purposes of political analysis, the state of nature typically was understood to be an abstract condition rather than an historical time or place. Therefore natural rights could be defined by the absence of subjection to others, with or without reference to primitive cultural and economic conditions. For example, not only the right to eat but also the right to shave could be considered a natural right. Put another way, natural rights were the rights or the freedom of individuals as individuals. Hence, the synonymous labels, "human rights" or "rights of men."

15 JOHN WITHERSPOON, *AN ANNOTATED EDITION OF LECTURES ON MORAL PHILOSOPHY* (Lecture XII) (Of Civil Society) 141 (Jack Scott ed., 1982).

16 2 DOCUMENTARY HISTORY, *supra* note 11, at 470 (statement of James Wilson at Pa. Rat. Convention, Dec. 4, 1787).

17 *Id.*; see also *infra* text at note 20 and *infra* notes 24, 35 and 43.



alists, enumerated powers and thereby avoided the danger of an incomplete enumeration of rights. For example, Wilson cautioned:

[I]n a government consisting of enumerated powers, such as is proposed for the United States, a bill of rights would not only be unnecessary, but, in my humble judgment, highly imprudent. In all societies, there are many powers and rights, which cannot be particularly enumerated. A bill of rights annexed to a constitution is an enumeration of the powers reserved. If we attempt an enumeration, everything that is not enumerated is presumed to be given. The consequence is, that an imperfect enumeration would throw all implied power into the scale of the government; and the rights of the people would be rendered incomplete.<sup>18</sup>

This danger of omitting a valuable right could be avoided with a list of powers:

On the other hand, an imperfect enumeration of the powers of government reserves all implied power to the people; and, by that means the constitution becomes incomplete; but of the two it is much safer to run the risk on the side of the constitution; for an omission in the enumeration of the powers of government is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people.<sup>19</sup>

A list of powers was the safer alternative; it could provide a general and therefore complete reservation of rights.

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18 2 DOCUMENTARY HISTORY, *supra* note 11, at 388 (statement of James Wilson at Pa. Rat. Convention, Nov. 28, 1787). In his famous State House speech, Wilson said:

When the people established the powers of legislation under their separate governments, they invested their representatives with every right and authority which they did not in explicit terms reserve; and therefore upon every question, respecting the jurisdiction of the house of assembly, if the frame of government is silent, the jurisdiction is efficient and complete. But in delegating federal powers, another criterion was necessarily introduced, and the congressional authority is to be collected, not from tacit implication, but from the positive grant expressed in the instrument of union. Hence it is evident, that in the former case everything which is not reserved is given, but in the latter the reverse of the proposition prevails, and everything which is not given, is reserved. This distinction being recognized, will furnish an answer to those who think the omission of a bill of rights, a defect in the proposed Constitution . . . .

James Wilson, Speech in the State House Yard (Oct. 6, 1787), in 2 *id.* at 167-68. See also 9 DOCUMENTARY HISTORY, *supra* note 11, at 1080 (statement of Henry Lee at Va. Rat. Convention, June 9, 1788).

19 2 DOCUMENTARY HISTORY, *supra* note 11, at 388 (statement of James Wilson at Pa. Rat. Convention, Nov. 28, 1787).

Wilson was not alone in arguing that an enumeration of rights was dangerous. For example, an anonymous Federalist wrote:

It is well known that several of the states on the continent have never made any formal declaration of their rights. Well aware of the impossibility of enumerating all those blessings to which by nature they were entitled, and highly sensible of the danger there was intrusting to their recollection of them (knowing that when once they attempted to set to them legal bounds, what ever should by chance be left out, was of course given up) some of the states more prudently thought fit to enumerate on the other hand what should be the powers of their government, when of course whatever was omitted [sic] on that side, remained as their natural and inviolable rights on the other. And but few states in the world have deemed it safe to do otherwise.<sup>20</sup>

Similarly, Madison said:

As to a solemn declaration of our essential rights, he thought it unnecessary and dangerous—Unnecessary, because it was evident that the General Government had no power but what was given it, and the delegation alone warranted the exercise of power—Dangerous, because an enumeration which is not complete, is not safe. Such an enumeration could not be made within any compass of time, as would be equal to a general negation, . . .<sup>21</sup>

As Hamilton concluded, "[t]he truth is, after all the declamations we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS. . . . [T]he proposed Constitution, if adopted, will be the bill of rights of the Union."<sup>22</sup>

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20 "The State Soldier" No. II, Feb. 6, 1788, *reprinted in* 8 DOCUMENTARY HISTORY, *supra* note 11, at 352.

21 10 DOCUMENTARY HISTORY, *supra* note 11, at 1507 (statement of James Madison at Va. Rat. Convention, June 24, 1788); *see also* 10 *id.* at 1502.

22 THE FEDERALIST No. 84, at 560-61 (Alexander Hamilton) (Edward M. Earle ed., 1950). Additionally, Hamilton insisted:

[B]ills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. . . . Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power.

Just as Federalists questioned the safety of enumerating rights, so too some Federalists revealed a concern about the list of federal powers. Although most Federalists argued that the Constitution had successfully enumerated federal powers and thereby had limited federal authority, a few also acknowledged—that the framers clearly had taken into account—that it was impossible to enumerate all of the powers Congress might require. Madison explained:

Had the convention attempted a positive enumeration of the powers necessary and proper for carrying their other powers into effect, the attempt would have involved a complete digest of laws on every subject to which the Constitution relates; accommodated too, not only to the existing state of things, but to all the possible changes which futurity may produce; for in every new application of a general power, the *particular powers*, which are the means of attaining the *object* of the general power, must always necessarily vary with that object, and be often properly varied whilst the object remains the same.<sup>23</sup>

A complete list of the particular means the federal government would need to carry out its enumerated powers was simply not possible. Nonetheless, by distinguishing between general powers and the particular means of carrying them out, Madison could preserve the essential Federalist argument that the powers of the federal government had all been enumerated. He could argue that the document did, in fact, enumerate all general federal powers and that the Necessary and Proper Clause merely concerned the means of carrying out the general powers.<sup>24</sup>

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*Id.* at 559; see also, e.g., "Plain Truth," *Reply to An Officer of the Late Continental Army*, INDEPENDENT GAZETTEER, Nov. 10, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 11, at 218.

23 THE FEDERALIST, *supra* note 22, No. 44, at 293-94 (James Madison). He continued:

Had they attempted to enumerate the particular powers or means not necessary or proper for carrying the general powers into execution, the task would have been no less chimerical; and would have been liable to this further objection, that every defect in the enumeration would have been equivalent to a positive grant of authority.

*Id.* at 294. The Necessary and Proper standard was fixed and permanent, although under this standard there would be changes in the particular powers the government could use to carry out the general powers that were enumerated.

24 Later, when proposing what became the Bill of Rights, Madison qualified his arguments about the efficacy of the enumeration of powers and acknowledged that the Necessary and Proper Clause was one of the reasons why a bill of rights was useful:

It has been said that in the federal government they [declarations of rights] are unnecessary, because the powers are enumerated, and it follows that all that are not granted by the constitution are retained: that the constitution is a bill of

Later, when Madison introduced his proposals for what became the Bill of Rights, he continued to worry about the danger of enumerating—particularly the danger of enumerating rights held against the federal government. A year after the ratification of the Constitution, and in the wake of demands from some of his constituents, Madison presented the House of Representatives with his proposal for a bill of rights. He hoped it would “satisfy the public mind that their liberties will be perpetual, and this without endangering any part of the constitution . . . considered as essential to the existence of the government by those who promoted its adoption.”<sup>25</sup> In proposing a bill of rights, however, Madison could hardly forget his own arguments that, if rights against the federal government were enumerated, the failure to mention a right might be interpreted to imply federal power. Therefore, he took care to prohibit such an interpretation with the following:

The exceptions here or elsewhere in the constitution, made in favor of particular rights, shall not be so construed as to diminish the just importance of other rights retained by the people; or as to enlarge the powers delegated by the constitution; but either as actual limitations of such powers, or as inserted merely for greater caution.<sup>26</sup>

This was later reduced to the more familiar statement that, “[t]he enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>27</sup> With these words,

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powers, the great residuum being the rights of the people; and therefore a bill of rights cannot be so necessary as if the residuum was thrown into the hands of the government. I admit that these arguments are not entirely without foundation; but they are not conclusive to the extent which has been supposed. It is true the powers of the general government are circumscribed, they are directed to particular objects; but even if government keeps within those limits, it has certain extraordinary powers with respect to the means, which may admit of abuse to a certain extent, . . . because in the constitution of the United States there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers . . .

CREATING THE BILL OF RIGHTS, *supra* note 1, at 82 (statement of James Madison, June 8, 1789). For prior Anti-Federalist arguments, see *infra* text at note 33.

25 *Id.* at 79-80. For Madison's political goals in proposing a bill of rights, see Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301; Wilfred E. Rumble, *James Madison on the Value of Bills of Rights*, in NOMOS XX: CONSTITUTIONALISM 122, 133 (J. Roland Pennock & John W. Chapman eds., 1979).

26 James Madison's Resolution (June 8, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 1, at 13.

27 U.S. CONST. amend. IX. For the history of the Ninth Amendment, see Kay, *supra* note 7, at 269-73; McAfee, *supra* note 8. The literature that takes another view of the

the Ninth Amendment ensured that the Bill of Rights would be understood, not as the sole definition of federal power, but rather merely as a list of "particular exceptions to the grant of power,"<sup>28</sup>—as an enumeration of exceptions to the enumeration of powers. Thus, even when drafting the Bill of Rights, Federalists still sought to avoid the danger of enumerating innumerable rights.

## II. ANTI-FEDERALISTS ON THE DANGER OF LEAVING RIGHTS UNENUMERATED

Whereas Federalists drew attention to the danger of listing rights, Anti-Federalists emphasized the danger of leaving rights unspecified. According to many Anti-Federalists, unmentioned rights were without significant constitutional protection.

Although many Anti-Federalists appear to have understood that the rights of individuals and states were innumerable, they tended, nonetheless, to be relatively indifferent to the dangers of listing rights. Of course, some Anti-Federalists did directly address the arguments of the Federalists that an incomplete enumeration was likely to be hazardous. For example, the "Federal Farmer" acknowledged that a bill of rights would be "dangerous, as individual rights are numerous, and not easy to be enumerated in a bill of rights;" he admitted that "it may be inferred, that others not mentioned are surrendered."<sup>29</sup> As Professor Thomas McAfee has observed, the "Federal Farmer" addressed this problem with a solution similar to what became the Ninth Amendment: "there are infinite advantages in particularly enumerating many of the most essential rights reserved in all cases; and as to the less important ones, we may declare in general terms, that all not expressly surrendered are reserved."<sup>30</sup> Other Anti-Federalists, however, simply

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Ninth Amendment is carefully reviewed in Professor McAfee's excellent article. Among other things, he shows that a version of what became the Ninth Amendment was proposed by the "Federal Farmer." See *infra* note 30 and accompanying text.

28 CREATING THE BILL OF RIGHTS, *supra* note 1, at 83 (statement of James Madison, June 8, 1789). In similar language, Hamilton had earlier explained that a bill of rights would be dangerous, because it "would contain various exceptions to powers not granted . . . I will not contend that . . . a provision [for the liberty of the press] would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power." THE FEDERALIST, *supra* note 22, No. 84, at 559 (Alexander Hamilton).

29 "Federal Farmer," Jan. 20, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST 323-24 (Herbert J. Storing ed., 1981).

30 *Id.*, discussed by McAfee, *supra* note 8, at 1275. Although most Anti-Federalists in-

minimized the risks of including an incomplete list in the Constitution. For example, after reviewing the rights that the framers had been willing to specify in the body of the Constitution, Robert Whitehill asked: "if there was danger in the attempt to enumerate the liberties of the people, lest it should prove imperfect and defective, how happens it, that in the instances I have mentioned, that danger has been incurred?"<sup>31</sup> By implication, the warnings of Federalists against an incomplete bill of rights were not to be taken seriously.

Indeed, Anti-Federalists typically did not even allude to the danger of listing rights but rather merely asserted that at least some rights—important rights—should have been enumerated. Unlike Federalists, who pointed to the hazards of an incomplete enumeration, Anti-Federalists argued that even a partial list was better than none. As Jefferson wrote to Madison, "half a loaf is better than no bread," and "if we cannot secure all our rights, let us secure what we can."<sup>32</sup> Anti-Federalists had little confidence that the people's virtue or spirit of liberty could survive for long under the federal government or could effectively constrain it. Nor did Anti-Federalists have faith that the enumeration of powers would substantially limit the new government, for the enumeration of powers had been supplemented by the Necessary and Proper Clause and would be expansively interpreted by the federal judiciary.<sup>33</sup> Therefore, only by specifying rights could the Constitution

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sisted that they could retain their rights only by enumerating them, one Anti-Federalist said that a clause reserving to the states powers not expressly granted to Congress "would have superseded the necessity of a bill of rights." 4 ELLIOT'S DEBATES, *supra* note 10, at 152 (statement of Samuel Spencer at N.C. Rat. Convention, July 4, 1788). Later, he again argued, "Such a clause would render a bill of rights unnecessary." 4 *id.* at 163 (July 29, 1788).

31 2 DOCUMENTARY HISTORY, *supra* note 11, at 427 (statement of Robert Whitehill at Pa. Rat. Convention, Nov. 30, 1787). He continued:

Have the people no other rights worth their attention, or is it to be inferred, agreeably to the maxim of our opponents, that every other right is abandoned? . . . [T]he argument of difficulty, which has been drawn from the attempt to enumerate every right, cannot now be urged against the enumeration of more rights than this instrument contains.

*Id.* For the response of Jasper Yeates, see *supra* note 12.

32 Letter from Thomas Jefferson to James Madison (Mar. 15, 1789), in CREATING THE BILL OF RIGHTS, *supra* note 1, at 219. This was in response to the objection that "a positive declaration of some essential rights could not be obtained in the requisite latitude." *Id.* Of course, Jefferson was in France and was not exactly an Anti-Federalist.

33 *E.g.*, "Brutus," No. V, N.Y. J., Dec. 13, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 11, at 423.

alert the people to infringements of their liberty or induce federal courts to restrain the federal government.<sup>34</sup> Accordingly, Anti-Federalists argued that it was better to secure some rights than none at all and repeatedly demanded enumeration of the "important," "essential," and "great" rights of Americans.

How did Anti-Federalists define important or essential rights? The "Federal Farmer," for example, asked for enumeration of "those rights which are particularly valuable to individuals, and essential to the permanency and duration of free government."<sup>35</sup> The Anti-Federalist minority of the Pennsylvania ratifying conven-

34 For example, "An Old Whig" wrote of Congressmen who would find expansive legislative authority under the Necessary and Proper Clause: "[I]t is not of a farthing consequence whether they really are of opinion that the law is necessary and proper, or only *pretend to think so*; for who can overrule their pretensions?—No one, unless we had a bill of rights to which we might appeal, and under which we might contend against any assumption of undue power and appeal to the judicial branch of the government to protect us by their judgements." "An Old Whig," No. II, *INDEPENDENT GAZETTEER*, Oct. 17, 1787, *reprinted in* 13 *DOCUMENTARY HISTORY*, *supra* note 11, at 402. Incidentally, note the implications of the Anti-Federalist position for judicial review.

35 "Federal Farmer," January 20, 1788, *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 29, at 329. Taking a variant of this approach, Jefferson wrote that important rights were those "which it is useless to surrender to the government, and which yet, governments have always been fond to invade." Letter from Thomas Jefferson to David Humphreys (Mar. 18, 1789), *in* 14 *THE PAPERS OF THOMAS JEFFERSON* 678 (J. Boyd ed., 1958). Another Anti-Federalist said: "When individuals enter into society, they give up some rights to secure the rest. There are certain human rights that ought not to be given up, and which ought in some manner to be secured. With respect to these great essential rights, no latitude ought to be left." 4 *ELLIOT'S DEBATES*, *supra* note 10, at 153 (statement of Samuel Spencer at N.C. Rat. Convention, July 29, 1788). "Brutus" wrote:

There are certain rights which mankind possess, over which government ought not to have any controul, because it is not necessary they should, in order to attain the end of its institution. There are certain things which rulers should be absolutely prohibited from doing, because, if they should do them, they would work an injury, not a benefit to the people.

"Brutus," No. IX, N.Y. J., Jan. 17, 1788, *reprinted in* 15 *DOCUMENTARY HISTORY*, *supra* note 11, at 393. "An Old Whig" wrote:

To define what portion of his natural liberty, the subject shall at all times be entitled to retain, is one great end of a bill of rights. To these may be added in a bill of rights some particular engagements of protection, on the part of government, without such a bill of rights, firmly securing the privileges of the subject, the government is always in danger of degenerating into tyranny . . . .

"An Old Whig," No. IV, *INDEPENDENT GAZETTEER*, Oct. 27, 1787, *reprinted in* 13 *DOCUMENTARY HISTORY*, *supra* note 11, at 501. He also wrote:

[W]e ought carefully to guard ourselves by a BILL OF RIGHTS, against the invasion of those liberties which it is essential for us to retain, which it is of no real use to government to strip us of; but which in the course of human events have been too often insulted with all the wantonness of an idle barbarity.

*Id.* at 502.

tion demanded "a BILL of RIGHTS ascertaining and fundamentally establishing those unalienable and personal rights of men, without the full, free, and secure enjoyment of which there can be no liberty, and over which it is not necessary for a good government to have the control."<sup>36</sup> More attentive to the risks of seeking the enumeration of what might be considered trivial, the "Impartial Examiner" warned:

A cautious people will consider all the inducements to enter into the *social state*, from the most important object down to the minutest prospect of advantage. Every motive with them will have its due weight. They will not pay a curious attention to trifles and overlook matters of great consequence:—and in pursuing these steps they will provide for the attainment of *each* point in view with a care—with an earnestness proportionate to its dignity, and according as it involves a *greater* or a *lesser* interest. It is evident, therefore that they should attend most diligently to those sacred rights, which they have received with their birth, and which can neither be retained to themselves, nor transmitted to their posterity, unless they are *expressly reserved* . . . .<sup>37</sup>

Notwithstanding that they reached a very different conclusion, Federalists could share some of the assumptions implicit in these arguments for the enumeration of important rights.

Although by demanding the enumeration of important or essential rights, numerous Anti-Federalists indicated a willingness to accept an incomplete enumeration of rights, many Anti-Federalists had difficulty bringing their lists to a close. Without high expectations that the federal government would be adequately restrained, either by public sentiment or by the Constitution's enumeration of powers, Anti-Federalists assumed that the rights not specified with particularity would not be protected. On this basis, many Anti-Federalists appealed—often in tones of undisguised an-

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36 *The Address and Reasons of the Dissent of the Minority of the Convention*, PA. PACKET, Dec. 18, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 11, at 630. After the Constitution was ratified, some Anti-Federalists from Pennsylvania desired that "such a declaration of rights may be added to the general frame of government as may secure to posterity those privileges which are essential to the proper limiting the extent of sovereign power, and securing those rights which are essential to freemen . . ." *Amendments Proposed by Westmoreland County Committee*, PITTSBURGH GAZETTE, Sept. 20, 1788, reprinted in 1 THE DOCUMENTARY HISTORY OF THE FIRST FEDERAL ELECTIONS 1788-1790, at 278 (Merrill Jensen & Robert A. Becker eds., 1976).

37 "Impartial Examiner," VA. INDEPENDENT CHRON., Feb. 20, 1788, reprinted in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 29, at 176.



guish—for remarkably long lists of rights. Some even sought to enumerate rights that were not clearly important or essential. Most notably, the dissenting members of the Pennsylvania ratifying convention demanded, in their eighth proposal, the right “to fowl and hunt in seasonable times, on the lands they hold.”<sup>38</sup>

The general statements of Anti-Federalists confirm that at least a small number of them were tempted to abandon the distinction between the important and the trivial. The “Federal Farmer” appears to have backed away slightly from the standard of listing only “essential” or “important” rights when he disclaimed that he wanted to enumerate rights of “inconsiderable importance.”<sup>39</sup> Indeed, he subsequently observed that “fundamental rights” were not the only ones that “ought to be expressly secured,” and that “it is pretty clear, that some other[s] of less importance, or less in danger, might with propriety also be secured.”<sup>40</sup> Other Anti-Federalists were less subtle. Luther Martin, who regretted “[t]he rejection of the clauses attempted in favour of particular rights,” became “impressed with the necessity of not merely attempting to secure a few rights, but of digesting and forming a complete bill of rights, including those of states and of individuals.”<sup>41</sup> With a thorough, if

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38 The complete proposal was:

8. The inhabitants of the several states shall have liberty to fowl and hunt in seasonable times, on the lands they hold, and on all other lands in the United States not enclosed, and in like manner to fish in all navigable waters, and others not private property, without being restrained therein by any laws to be passed by the legislature of the United States.

*The Address and Reasons of the Dissent of the Minority of the Convention*, PA. PACKET, Dec. 18, 1787, reprinted in 2 DOCUMENTARY HISTORY, *supra* note 11, at 624. This was different from the right to bear arms, which had far broader implications, domestic and foreign, than just a right to fowl and hunt. Indeed, in the *Address and Reasons*, the immediately preceeding provision began: “7. That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . .” *Id.* at 623-24.

39 “It is not my object to enumerate rights of inconsiderable importance; but there are others, no doubt, which ought to be established as a fundamental part of the national system.” “Federal Farmer,” Nov. 8, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 11, at 47. He also wrote that “the people especially having began, ought to go through enumerating, and establish particularly all the rights of individuals, which can by any possibility come in question in making and executing federal laws.” “Federal Farmer,” Jan. 20, 1788, reprinted in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 29, at 327.

40 *Id.* at 330.

41 Luther Martin, *An Address to the Citizens of Maryland, On the Subject of the Federal Constitution*, MD. J., Mar. 21, 1788, reprinted in 16 DOCUMENTARY HISTORY, *supra* note 11, at 456.

naive, understanding of the consequences of Anti-Federalist assumptions, George Turberville declared the necessity of a "very full and explanatory" bill of rights, in which "not only the Liberty of the press, the trial by Jury of the vicinage & all those great points—but even every the most trivial privilege [sic] that Citizens have a right to possess—shou'd be expressly stipulated and reserved."<sup>42</sup> All rights held against the federal government, "even every the most trivial" were to be reduced to an express enumeration of particulars.<sup>43</sup>

### III. TRIVIAL RIGHTS

In response to the Anti-Federalist vision of constitutional particularity, Federalists defended the Constitution's exclusion of a bill of rights and in so doing not only spoke generally against an enumeration of rights but also objected to the enumeration of some specific categories of rights. Among these were impermanent rights, implied rights, minutiae, and rights not likely to be infringed—the last being what Federalists were especially apt to consider trivial.

According to Federalists, constitutions and the rights they protected were to be permanent, and on this ground, Federalists

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42 Letter from George L. Turberville to Arthur Lee (Oct. 28, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 11, at 506.

43 One Anti-Federalist considered it "a general rule that wherever the powers of a government extend to the lives, the persons, and properties of the subject, all their rights ought to be clearly and expressly defined, otherwise they have but a poor security for their liberties." "A Democratic Federalist," PA. HERALD, Oct. 17, 1787, *reprinted* in 2 DOCUMENTARY HISTORY, *supra* note 11, at 194. "Brutus" wrote that "the most express and full declaration of rights [ought] to have been made." "Brutus," Nov. 1, 1787, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 29, at 372. He advocated "expressly reserving to the people such of their essential natural rights, as are not necessary to be parted with." 2 *id.* at 373. Another Anti-Federalist wrote that "there is no restraint in the form of a bill of rights, to secure (what doctor Blackstone calls) that residuum of human rights, which is not intended to be given up to society, and which indeed is not necessary to be given for any good purpose." Richard H. Lee, *A Letter to Gov. Edmund Randolph on the Subject of the Federal Constitution*, VA. GAZETTE, Oct. 22, 1787, *reprinted* in 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 29, at 114. With some sarcasm, a Federalist—the Swedish Lutheran minister, Nicholas Collin—observed that "[m]any tremble under this mighty and universal sway of a federal government; and would at least have a long bill of rights as a small security against warrants, jails, inquisitions, prosecutions for libels &c." [Nicholas Collin], *Remarks on the Amendments to the Federal Constitution*, No. 28, FED. GAZETTE AND PHILADELPHIA EVENING POST, No. 119, Feb. 16, 1789.

Incidentally, the German historian, von Holst, went so far as to allude to the Anti-Federalists as "the particularists." H. VON HOLST, 1 THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES 54-61 (John J. Lalor & Alfred B. Mason trans., 1877).

opposed the enumeration of rights that might become obsolete.<sup>44</sup> For example, James Iredell pointed out the risks of enumerating a right against severe punishments. While rejecting language against "cruel and unusual punishment" as too vague, Iredell argued that a more detailed clause either would be ineffectual or would render the federal government incapable of responding to changing circumstances:

If . . . the Convention had enumerated a vast variety of cruel punishments, and prohibited the use of any of them, . . . and if our government had been disposed to be cruel their invention would only have been put to a little more trouble. . . . If . . . they had determined . . . positively what punishments should [be used], this must have led them into a labyrinth of detail which in the original constitution of a government would have appeared perfectly ridiculous, and not left a room for such changes, according to circumstances, as must be in the power of every Legislature that is rationally formed.<sup>45</sup>

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44 See Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 MICH. L. REV. 239, 295-97 (1989). Anti-Federalists often asserted that Americans could make their rights permanent—or at least as permanent as possible—by enumerating them in the U.S. Constitution. In contrast, Federalists and even some Anti-Federalists understood that a constitution adapted merely to the circumstances of one age might not be suited to the circumstances of another and on this account sought an instrument that would be permanent in the sense that it would not require alteration.

45 JAMES IREDELL, ANSWER TO MR. MASON'S OBJECTIONS TO THE NEW CONSTITUTION (1788), reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788, at 360 (Paul L. Ford ed., Burt Franklin 1971) (1888) [hereinafter PAMPHLETS ON THE CONSTITUTION]. Another Federalist wrote:

Suppose such a bill of rights formed, and the Constitution ratified and in exercise. An adventitious circumstance arises, for which no provision has been made in the Constitution, and is wholly left out of the bill of rights; from whence must the power flow to remedy or provide against the evil. By the Constitution there is no power vested in the government; by the bill of rights, the people have lamented the sovereignty retained by them. I believe every man of common sense would say that the people, or the sovereign power, cannot be affected by any such declaration of rights, they being the source of all power in the government; whatever they have not given away still remains inherent in them . . . . I therefore conclude, had a bill of rights been formed by the late Convention, the good sense of the people would universally have revolted at such a display of unjustifiable confidence, founded on a mistaken notion of the nature of our government and the source from whence all authority in the United States must necessarily flow.

*Reply to George Mason's Objections to the Constitution*, N.J. J., Dec. 19, 1787, reprinted in 3 DOCUMENTARY HISTORY, *supra* note 11, at 154-55.

The framers and Federalists sought a document that was already accommodated to future circumstances rather than one that would have to be reinterpreted or rewritten to meet new exigencies. They hoped to make the Constitution's enumeration of rights permanent by leaving out such rights as might become obsolete, particularly those that might become impediments to effective government.

Federalists also objected to the enumeration of rights implied by other enumerated rights. For example, in the congressional debates about the Bill of Rights, Representative Theodore Sedgwick of Massachusetts objected to the inclusion of the right of assembly, in part because "[t]he right will be as fully recognized if the words are struck out, as if they were retained: For if the people may converse, they must meet *for* the purpose."<sup>46</sup> In short, the right of assembly was implied by another enumerated right, that of free speech. Similarly, Madison said of the right to instruct representatives that, to the extent it deserved constitutional protection, it was already "provided for" by the enumeration of "freedom of speech."<sup>47</sup> A right did not have to be listed if it could be derived

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46 CREATING THE BILL OF RIGHTS, *supra* note 1, at 154 (statement of Theodore Sedgwick, Aug. 15, 1789) (emphasis added). Immediately beforehand, he said: "[T]his is a self evident unalienable right of the people . . . and it does appear to me below the dignity of this house, to insert such things in the constitution." *Id.* at 154. He also said of what became the First Amendment that:

[H]e feared it would tend to make them appear trifling in the eyes of their constituents; what, said he, shall we secure the freedom of speech, and think it necessary at the same time to allow the right of assembling? If people freely converse together, they must assemble for that purpose . . . .

*Id.* at 159. He argued that "if they [the words referring to the right of assembly] were understood or implied in the word consult, they were utterly unnecessary . . . ." *Id.* at 161.

47 CREATING THE BILL OF RIGHTS, *supra* note 1, at 167 (statement of James Madison, Aug. 15, 1789). After complaining of the "difficulties arising from discussing and proposing abstract propositions, of which the judgment may not be convinced," Madison said:

I venture to say that if we confine ourselves to an enumeration of simple acknowledged principles, the ratification will meet with but little difficulty. Amendments of a doubtful nature will have a tendency to prejudice the whole system; the proposition now suggested, partakes highly of this nature; it is doubted by many gentlemen here . . . . In one sense this declaration is true, in many others it is certainly not true; in the sense in which it is true, we have asserted the right sufficiently in what we have done; if we mean nothing more than this, that the people have a right to express and communicate their sentiments and wishes, we have provided for it already. The right of freedom of speech is secured; the liberty of the press is expressly declared to be beyond the reach of this government; the people may therefore publicly address their representatives; may privately advise them, or declare their sentiments by petition to the whole body;

from a more general enumerated right.

In addition, Federalists accused opponents of the Constitution of seeking to include in that document the minutiae of a code.<sup>48</sup> After the Constitution was ratified, one Federalist argued that "if the Federal Constitution was charged with a minute regulation of what may be expedient, and how it should be done, in every possible situation, and with a scrupulous enumeration of all the rights of the states and individuals, it would make a larger volume than the Bible . . . ." <sup>49</sup> Indeed, as Hamilton protested, "a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the nation, than to a constitution which has the regulation of every species of personal

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in all these ways they may communicate their will. If gentlemen mean to go further, and to say that the people have a right to instruct their representatives in such a sense as that the delegates were obliged to conform to those instructions, the declaration is not true.

CREATING THE BILL OF RIGHTS, *supra* note 1, at 167 (statement of James Madison, Aug. 15, 1789).

48 One Federalist wrote:

'Tis objected further that the constitution contains *no declaration of rights*. I answer this is not true,—the constitution contains a declaration of many rights, and very important ones, e.g. that people shall be obliged to fulfil their contracts, . . . that no *ex-post facto* laws shall be made &c. but it was no part of the business of their appointment to make a code of laws—it was sufficient to fix the constitution right, and that would pave the way for the most effectual security of the rights of the subject.

"A Citizen of Philadelphia," Remarks on the Address of Sixteen Members of the Assembly of Pennsylvania (Oct. 18, 1787), in 13 DOCUMENTARY HISTORY, *supra* note 11, at 302. See also statement by Iredell, *supra* text at note 45.

49 [Nicholas Collin], *Remarks on the Amendments to the Federal Constitution*, No. 2, FED. GAZETTE AND PHILADELPHIA EVENING POST, No. 21, Oct. 24, 1788. He also wrote:

After all, this childish jealousy would render liberty less secure, because a bold and artful Congress could safely invade the people through the holes they had forgot to stop, without any legal charge of treason; as all that was not reserved in such exact detail, must be supposed fairly granted . . . [W]e cannot pin a servant down to stiff minute rules: a blockhead or knave who wants them, is not worth keeping.

*Id.* Not only did Anti-Federalists seek enumeration of many rights, but also they disagreed about the rights to be listed. After reciting some Anti-Federalist proposals, Tench Coxe observed, "Nor does the account of particulars end here. The objections severally made by the three honorable gentlemen and the Pennsylvania Minority are so *different*, and even *discordant* . . . that all hope of greater unanimity of opinion . . . must be given up . . . ." "Philanthropos" [Tench Coxe], PA. GAZETTE, Jan. 16, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 11, at 393.

and private concerns."<sup>50</sup> Especially in a federal constitution, a detailed list of rights could be considered inappropriate.

Most dramatically, Federalists ridiculed enumerations that included trivial rights. In mocking Anti-Federalists for seeking to enumerate trivial rights, Federalists did not merely repeat the distinction between rights essential to the preservation of liberty and rights that were not essential. Rather, Federalists urged that it was unnecessary to specify rights that were trivial in another sense—typically, in the sense that they were unlikely to be infringed and therefore did not need to be enumerated.

Federalists had varied reasons for questioning the danger to rights, but in discussing trivial rights, they focused on two particularly salient reasons for considering rights quite safe. First, as already observed, Federalists argued that the enumeration of powers had effectively limited the federal government and had left it with little power over the rights that so concerned Anti-Federalists. Second, Federalists suggested that the new government would be influenced by public sentiment and therefore would not be inclined to misuse such power as it had. In arguing that the absence of a bill of rights was not necessarily a defect in the Constitution, substantial numbers of Federalists had insisted that rights (and more generally liberty) depended for protection as much upon popular attitudes—the people's virtue and spirit of liberty—as upon paper guarantees.<sup>51</sup> Even rights enumerated in the Constitu-

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50 THE FEDERALIST, *supra* note 22, No. 84, at 559 (Alexander Hamilton); *see also id.*, No. 44, at 293 (James Madison) (discussing enumeration of powers).

51 *See, e.g.*, John Dickinson, *Letters of Fabius*, in PAMPHLETS ON THE CONSTITUTION, *supra* note 45, at 186; Noah Webster, *Government*, 1 AM. MAG. 137, 140 (1788); "Uncus," MD. J., Nov. 9, 1787, reprinted in 14 DOCUMENTARY HISTORY, *supra* note 11, at 77-78, 81; THE FEDERALIST, *supra* note 22, No. 83, at 564 (Alexander Hamilton); *id.*, No. 84, at 580 (Alexander Hamilton); Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 THE PAPERS OF JAMES MADISON 297 (Robert A. Rutland & Charles F. Hobson eds., 1977) [hereinafter MADISON PAPERS]; Letter from George Lee Turberville to James Madison (Apr. 16, 1788), in 11 *id.* at 24; Letter from G.L. Turberville to James Madison (June 16, 1789), in 12 *id.* at 224-25.

A few Federalists took the extreme position that some rights were too important to be enumerated. After listing various rights, Roger Sherman wrote:

These last are undoubtedly important points, much too important to depend on mere paper protection. For, guard such privileges by the strongest expressions, still if you leave the legislative and executive power in the hands of those who are or may be disposed to deprive you of them—you are but slaves . . . The only real security that you can have for all your important rights must be in the nature of your government.

tion, they said, required more than paper protection and would survive only as long as the people's spirit of liberty.<sup>52</sup> Accordingly, when Anti-Federalists demanded that the Constitution enumerate rights—particularly when they demanded that it enumerate rights not clearly within the scope of the enumerated federal powers—Federalists tended to be skeptical as to whether such rights really were in any danger.<sup>53</sup>

The most familiar statement of the Federalist position occurred after ratification, during the House debates about the Bill

"A Countryman" [Roger Sherman], No. II, NEW HAVEN GAZETTE, Nov. 22, 1787, *reprinted in* 14 DOCUMENTARY HISTORY, *supra* note 11, at 172, 173. Another Federalist wrote of "the liberty of the press" that:

[It was] a right which Nature, and Nature's God, has given, and too sacred to require being mentioned in the natural transactions of these states. Had it been reserved by a particular article, posterity might imagine *we* thought it *wanted* written laws for security; an idea we would not choose should disgrace the legislature of the United States. If in England, "the only operative and efficient check upon the conduct of administration is *the sense of the people at large*," what *greater* security for the "liberty of the press," would the *Centinel* wish for, than "*the sense of the people at large*" of these states.

"Uncus," MD. J., Nov. 9, 1787, *reprinted in* 14 *id.* at 78.

52 *E.g.*, Letter from George Lee Turberville to James Madison (Apr. 16, 1788), *in* 11 MADISON PAPERS, *supra* note 51, at 23-24.

53 A Federalist wrote: "There is not the least danger of the federal government compelling persons of a scrupulous conscience to bear arms, as the United States would be poorly defended by such; besides, troops can, if necessary, be hired for their money." [Nicholas Collin], *Remarks on the Amendments to the Federal Constitution*, No. 9, FED. GAZETTE AND PHILADELPHIA EVENING POST, No. 42, Nov. 18, 1788. In complaining that the liberty of conscience had not been specified, "An Old Whig" took note of and rejected the Federalist argument:

I know that a ready answer is at hand, to any objections upon this head. We shall be told that in this enlightened age, the rights of conscience are perfectly secure: There is no necessity of guarding them; for no man has the remotest thoughts of invading them. If this be the case, I beg leave to reply that now is the very time to secure them.

"An Old Whig," No. V, INDEPENDENT GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 11, at 538. When interested in obtaining an enumeration of rights, Madison urged "that the clearest, and strongest provision ought to be made, for all those essential rights, which have been thought in danger, such as the rights of conscience, the freedom of the press, trial by jury, exemption from general warrants, &c." Letter from James Madison to Thomas Mann Randolph (Jan. 13, 1789), *in* 11 MADISON PAPERS, *supra* note 51, at 416. Largely for political reasons, Madison urged the adoption of a bill of rights, even if it included some "unimportant" provisions. CREATING THE BILL OF RIGHTS, *supra* note 1, at 80 (statement of James Madison, June 8, 1789). Similarly, Washington had written to him: "I see nothing exceptionable in the proposed amendments. Some of them, in my opinion, are importantly necessary, others, though in themselves (in my conception) not very essential, are necessary to quiet the fears of some respectable characters and well meaning Men." Letter from George Washington to James Madison (ca. May 31, 1789), *in* 12 MADISON PAPERS, *supra* note 51, at 191.

of Rights. Congressman Theodore Sedgwick had made a motion to strike the right of assembly from the proposed enumeration. In defense of the right of assembly, Egbert Benson of New York—also a Federalist—explained that the Bill of Rights had been framed to protect “inherent” or natural rights: “The committee who framed this report, proceeded on the principle that these rights belonged to the people; they conceived them to be inherent, and all that they meant to provide against, was their being infringed by the government.”<sup>54</sup> Sedgwick sharply replied:

[I]f the committee were governed by that general principle, they might have gone into a very lengthy enumeration of rights; they might have declared that a man should have a right to wear his hat if he pleased, that he might get up when he pleased, and go to bed when he thought proper . . . [Was] it necessary to enter these trifles in a declaration of rights, in a government where none of them were intended to be infringed[?]<sup>55</sup>

Sedgwick did not, however, have the last word. In response to his suggestion that the right of assembly, like the right to wear a hat, was unlikely to be infringed, John Page of Virginia—another Federalist—reminded his colleagues that the right to wear a hat had on occasion been violated:

The gentleman from Massachusetts, (mr. Sedgwick) . . . objects to the clause; because the right is of so trivial a nature; he supposes it no more essential than whether a man has a right to wear his hat or not, but let me observe to him that such rights have been opposed, and a man has been obliged to pull off his hat when he appeared before the face of authority; people have also been prevented from assembling together on their lawful occasions, therefore it is well to guard against such stretches of authority, by inserting the privilege in the declaration of rights; if the people could be deprived of the power of assembling . . . they might be deprived of every other privilege contained in the clause.<sup>56</sup>

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54 CREATING THE BILL OF RIGHTS, *supra* note 1, at 159 (statement of Egbert Benson, Aug. 15, 1789).

55 CREATING THE BILL OF RIGHTS, *supra* note 1, at 159-60 (statement of Theodore Sedgwick, Aug. 15, 1789). Sedgwick also argued: “[I]t is certainly a thing that never would be called in question . . .” *Id.* at 159.

56 CREATING THE BILL OF RIGHTS, *supra* note 1, at 160 (statement of John Page, Aug. 15, 1789); *see also* the responses of Tucker, Gerry, Vining and Hartley. *Id.* at 160-61.



Like the right to wear a hat, the right of assembly had sometimes been infringed; moreover, the right of assembly was essential for the preservation of other rights. Perhaps, therefore, it was not trivial.

Sedgwick's ridicule—so adroitly turned against him by Page—was by no means original. Already during the ratification controversy, Federalists disparaged various Anti-Federalist proposals as trivial by comparing them to rights more obviously unsuitable for enumeration. In the autumn of 1787, in Philadelphia, an anonymous article in the *Pennsylvania Gazette* argued that:

The neglect of the Convention to mention the *Liberty of the Press* arose from a respect to the state constitutions, in each of which this palladium of liberty is secured . . . . But supposing this had not been done, the *Liberty of the Press* would have been an inherent and political right, as long as nothing was said *against* it. The Convention have said nothing to secure the privilege of eating and drinking, and yet no man supposes that right of nature to be endangered by their silence about it.<sup>57</sup>

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57 To the Freemen of Pennsylvania, PA. GAZETTE, Oct. 10, 1787, reprinted in 13 DOCUMENTARY HISTORY, *supra* note 11, at 363-64. The passage quoted in the text was reprinted in various newspapers, not only in Pennsylvania, but also in eight other states. 13 DOCUMENTARY HISTORY, *supra* note 11, at 366 n.1. The *Pennsylvania Gazette* article is not as sarcastic as Webster's known ventures in the trivial rights genre and therefore cannot without further information be attributed to him. All that is known with certainty is that Webster completed his pamphlet, *An Examination into the Leading Principles of the Federal Constitution*, in Philadelphia on October 10—the day the *Pennsylvania Gazette* article was published. DOCUMENTARY HISTORY, *supra* note 11, Microform Supplement: Pa. no. 142, at 708-09; see also *infra* note 58.

The gastronomic arguments of the *Pennsylvania Gazette* were echoed by other Federalists. A parody of Anti-Federalist complaints asserted "that the state governments will be very insecure under the new constitution; nay, that a man will not be permitted either to eat, drink, or sleep, wear his clothes, as he pleases." "No Conspirator," FED. GAZETTE, Apr. 19, 1788, reprinted in DOCUMENTARY HISTORY, *supra* note 11, Microform Supplement: Pa. no. 641, at 2427, cited by Brennan, *supra* note 2, at 1013 n.274. A Federalist later observed:

[I]t is idle to expect that any such barriers can be raised between a government and its subjects, as to prevent all occasional injury from a bad administration, b[e]cause the most necessary power may be abused. What is there in the world that may not? We may kill ourselves by eating! A physician may kill us by opobalsam or the Peruvian bark.

[Nicholas Collin], *Remarks on the Amendments to the Federal Constitution*, No. 28, FED. GAZETTE AND PHILADELPHIA EVENING POST, No. 119, Feb. 16, 1789. These were not, he thought, matters that belonged in the Constitution. He concluded by objecting to any amendments and saying that "[i]f we must at all amend, I pray for merely amusing

In other words, publishing, like eating and drinking, was a freedom unaffected by the Constitution, because nothing was said in the enumeration of powers that would permit the federal government to legislate on the subject.

On the same day that the *Pennsylvania Gazette* article mentioned the right to eat and drink, Noah Webster happened to be in Philadelphia, where he was completing a pamphlet in favor of ratification. In it, he provided another example of the trivial rights genre:

It is said that there is no provision made in the new constitution against a standing army in time of peace. Why do not people object that no provision is made against the introduction of a body of Turkish Janizaries; or against making the Alcoran the rule of faith and practice, instead of the Bible? The answer to such objections is simply this—*no such provision is necessary* . . . . Pennsylvania and North Carolina, I believe, are the only states that have provided against this danger at all events. Other states have declared that “no standing armies shall be kept up without the consent of the legislature.” But, this leaves the power entirely in the hands of the legislature. Many of the states have made *no provision* against this evil. What hazards these states suffer! Why does not a man pass a law in his family that no armed soldier shall be quartered in his house by his consent? The reason is very plain: no man will suffer his liberty to be abridged, or endangered—his disposition and his power are uniformly opposed to any infringement of his rights. In the same manner, the principles and habits, as well as the power of the Americans are directly opposed to standing armies; and there is as little necessity to guard against them by positive constitutions, as to prohibit the establishment of the Mahometan religion.<sup>58</sup>

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amendments; a little frothy garnish. But why do we not rather sit down as brothers, and feast on the substantial meat, for which we have fasted so long!” *Id.*

58 “A CITIZEN OF PHILADELPHIA” [NOAH WEBSTER], AN EXAMINATION INTO THE LEADING PRINCIPLES OF THE FEDERAL CONSTITUTION 36-37 (1787), *reprinted in* DOCUMENTARY HISTORY, *supra* note 11, Microform Supplement: Pa. no. 142, at 744-45. According to Webster’s diary, the pamphlet was published on October 17, 1787. *Id.* at 709.

Brutus responded:

A writer, in favor of this system, treats this objection as a ridiculous one. He supposes it would be as proper to provide against the introduction of Turkish janizaries, or against making the Alcoran a rule of faith.

From the positive, and dogmatic manner, in which this author delivers his opinions, and answers objections made to his sentiments—one would conclude, that he was some pedantic pedagogue who had been accustomed to deliver his

On account of the people's "principles and habits" and their unwillingness to suffer their liberty to be abridged, the rights Anti-Federalists wanted to enumerate were no more likely to be at risk than the right to be free of an Islamic establishment. Therefore, constitutional provisions specifying these rights were unnecessary.<sup>59</sup>

In the wake of Webster's ridicule, Federalists appear to have taken pleasure in finding similarly ludicrous comparisons. For example, commenting on the Anti-Federalist objection that the liberty of the press was not enumerated, Oliver Ellsworth dryly observed:

Nor is liberty of conscience, or of matrimony, or of burial of the dead; it is enough that Congress have no power to prohibit either, and can have no temptation. This objection is answered in that the states have all the power originally, and Congress have only what the states grant them.<sup>60</sup>

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dogmas to pupils, who always placed implicit faith in what he delivered.

But, why is this provision so ridiculous? [B]ecause, says this author, it is unnecessary. But, why is it unnecessary? "[B]ecause, the principles and habits, as well as the power of the Americans are directly opposed to standing armies; and there is as little necessity to guard against them by positive constitutions, as to prohibit the establishment of the Mahometan religion." It is admitted then, that a standing army in time of peace, is an evil. I ask then, why should this government be authorised to do evil? . . . [T]here is little reason to expect, that the interest of the people and their rulers will be the same.

Besides, if the habits and sentiments of the people of America are to be relied upon, as the sole security against the encroachment of their rulers, all restrictions in constitutions are unnecessary; nothing more is requisite, than to declare who shall be authorized to exercise the powers of government . . . This I suppose to be the sentiments of this author, as it seems to be of many of the advocates of this new system.

"Brutus," No. IX, N.Y. J., Jan. 17, 1788, *reprinted in* 15 DOCUMENTARY HISTORY, *supra* note 11, at 395-96. Another Anti-Federalist wrote:

I know that a ready answer is at hand, to any objections on this head. We shall be told that in this enlightened age, the rights of conscience are perfectly secure: There is no necessity of guarding them; for no man has the remotest thoughts of invading them. If this be the case, I beg leave to reply that now is the very time to secure them.

"An Old Whig," No. 5, PHILADELPHIA INDEPENDENT GAZETTEER, Nov. 1, 1787, *reprinted in* 13 DOCUMENTARY HISTORY, *supra* note 11, at 538.

59 Apparently taking his cue from Webster, Hugh Williamson argued: "We have been told that the Liberty of the Press is not secured by the New Constitution. Be pleased to examine the plan, and you will find that the Liberty of the Press and the laws of Mahomet are equally affected by it." Hugh Williamson, Speech at Edenton, N.C., Nov. 8, 1787, *in* N.Y. DAILY ADVERTISER, Feb. 25-27, 1788, *reprinted in* 16 DOCUMENTARY HISTORY, *supra* note 11, at 202.

60 "A Landholder" [Oliver Ellsworth], No. VI, Ct. Courant, Dec. 10, 1787, *in* 3 DOC-

Like the rights "of conscience," "of matrimony" and "of burial of the dead," the freedom of the press was, according to Ellsworth, a right that Congress had neither the power nor the temptation to prohibit. Therefore, however valuable, it did not require enumeration. With an echo, perhaps, of Ellsworth's allusion to matrimony, another Connecticut Federalist noted that "unless we suppose the institution of marriage will be abolished, consequent of a federal government, we cannot suppose the trial by jury will be infringed upon . . . ."<sup>61</sup>

Returning to the theme of trivial rights, Webster sarcastically attacked the eighth proposal of the Anti-Federalist minority of the Pennsylvania Ratifying Convention:

But to complete the list of unalienable rights, you would insert a clause in your declaration, *that every body shall, in good weather, hunt on his own land, and catch fish in rivers that are public property.* Here, Gentlemen, you must have exerted the whole force of your genius! Not even the *all-important* subject of *legislating for a world* can restrain my laughter at this clause! As a supplement to that article of your bill of rights, I would suggest the following restriction:—"That Congress shall never restrain any inhabitant of America from eating or drinking, *at seasonable times*, or prevent his lying on his *left side*, in a long winter's night, or even on his back, when he is fatigued by lying on his *right*."—This article is of just as much consequence as the 8th clause of your proposed bill of rights.<sup>62</sup>

Webster also asked Anti-Federalists why they did not seek clauses guaranteeing a man's right to till his own land or to milk his own cows.<sup>63</sup>

Why had Anti-Federalists sought to enumerate the right to hunt on one's own land? Webster's answer, far from being amusing, was, in fact, a thoughtful observation about the changes in society and landholding since feudal times:

But to be more serious, Gentlemen, you must have had in idea the forest-laws in Europe, when you inserted that article;

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UMENTARY HISTORY, *supra* note 11, at 490.

61 "A Citizen," NORWICH PACKET, Jan. 17, 1788, reprinted in DOCUMENTARY HISTORY, *supra* note 11, Microform Supplement: Ct. no. 73, at 310, cited by Brennan, *supra* note 2, at 1012 n.268.

62 "America" [Noah Webster], N.Y. DAILY ADVERTISER, Dec. 31, 1787, reprinted in 15 DOCUMENTARY HISTORY, *supra* note 11, at 199.

63 See *infra* note 64.

for no circumstance that ever took place in America, could have suggested the thought of a declaration in favor of hunting and fishing. . . . The Barons in Europe procured forest-laws to secure the right of hunting on *their own land*, from the intrusion of those who had no property in lands. But the distribution of land in America, not only supersedes the necessity of any laws upon this subject, but renders them absolutely trifling.<sup>64</sup>

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64 15 DOCUMENTARY HISTORY, *supra* note 11, at 199-200. The ellipsis contained the following:

Will you forever persist in error? Do you not reflect that the state of property in America, is directly the reverse of what it is in Europe? Do you not consider, that the forest-laws in Europe originated in *feudal tyranny*, of which not a trace is to be found in America? Do you not know that in this country almost every farmer is Lord of his own soil? That instead of suffering under the oppression of a Monarch and Nobles, a class of haughty masters, totally independent of the people, almost every man in America is a *Lord himself*—enjoying his property in fee? Where then the necessity of laws to secure hunting and fishing? You may just as well ask for a clause, giving license for every man to till *his own land*, or milk *his own cows*.

*Id.* The passage quoted in the text continued: "The same laws which secure the property in land, secure to the owner the right of using it as he pleases." *Id.* at 200.

After noting that Federalists had answered the "many objections" to the new federal government—"such as the want of a bill of rights; the neglect of a declaration in favour of the liberty of the press; the danger of our religious liberties, &c. &c."—a letter to the printers of the *Pennsylvania Gazette* sarcastically drew attention to some objections that, it said, were even more serious and that therefore required a Federalist response:

I beg leave to mention several objections which I have lately heard against it, which are of more weight than any thing which has yet appeared, and which I should be glad to see answered by some one of your numerous federal correspondents.

Having lately travelled through Montgomery county, I stopped at a tavern in the neighborhood of \_\_\_\_\_, where I met with a number of persons who had assembled together, for the purpose of settling some matters relative to the . . . election of members of [the] Convention . . . . They immediately began a conversation with me about the new government, and with one voice condemned it as a vile system of tyranny. I asked them what their objections to it were. One of them, who I was told, was a schoolmaster, retailed all the objections that are mentioned in the Centinel with a good deal of vehemence. As soon as he had finished, a second person complained that nothing was said in the new Constitution about the liberty of fishing and hunting, which were unalienable rights, and that we should from this omission, soon have game laws in the United States. I found this man was a sportsman, and that he had hunted and fished away a valuable plantation. A third, who was the elder of a Presbyterian meeting, said that no testimony was borne in the new government against the theater, and that now we should have plays and players in the state of Pennsylvania. A fourth objected to it, because no notice was taken of the Sabbath day. A fifth exclaimed against it, because a Roman Catholic and a Jew stood as good a chance of being President of the United States as a Christian or a Protestant. A sixth, who was a weaver, abused it, because it contained nothing it favour of

Webster added intelligent sociological analysis to his caustic humor.

In contrast, many Federalists who commented on trivial rights aspired merely to ridicule their opponents. For example, Hugh Henry Brackenridge derisively asked "if in this constitution there is the least provision for the privilege of shaving the beard? Or is there any mode laid down to take the measure of a pair of breeches?"<sup>65</sup> Years later, in justifying this less-than-dignified contribution to the ratification controversy, Brackenridge explained:

[It] is a sample, perhaps a caricature, of the objections to the adopting the Federal Constitution, as they appeared in the publications of the time. Ridicule is not the test of truth, but it may be employed to expose error, and on this occasion it seemed not amiss to use it a little, as a great object was at

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American manufactures. A seventh, who I was told had lately broken a new waggon in driving it over a piece of bad road, complained, that it contained nothing in favour of repairing our roads. Many other objections of a like nature were made, which I do not now recollect.

I hope Mr. Wilson, at our next town meeting, will answer those which I have mentioned . . . ."

"An Enquirer," N.H. SPY, Dec. 4, 1787, vol. III, no.12 ("From the Pennsylvania Gazette"), cited in MORTON BORDEN, *JEWS, TURKS AND INFIDELS* 134, n.43 (1984); see also, e.g., Alexander White, *To the Citizens of Virginia*, WINCHESTER, VA. GAZETTE, Feb. 22, 1788, reprinted in 8 DOCUMENTARY HISTORY, *supra* note 11, at 404; ALLAN NEVINS, *THE AMERICAN STATES DURING AND AFTER THE REVOLUTION, 1775-1789*, at 240 (1924).

65 Hugh Henry Brackenridge, *Cursory Remarks on the Federal Constitution*, PITTSBURGH GAZETTE, March 1, 1788, reprinted in HUGH HENRY BRACKENRIDGE, *GAZETTE PUBLICATIONS* 78-79 (1806). Satirizing some Anti-Federalist complaints that the Constitution did not prevent Jews, Turks and infidels from being elected to the Presidency, Brackenridge mockingly appealed to 'other prejudices:

The first thing that strikes a diligent observer, is the want of precaution with respect to the sex of the president. Is it provided that he shall be of the male gender? . . . Without a[n] . . . exclusion what shall we think, if in progress of time we should come to have an *old woman* at the head of our affairs? But what security have we that he shall be a *white man*? What would be the national disgrace if he should be elected from one of the southern states, and a *vile negro* should come to rule over us? . . . But is there any security that he shall be a *freeman*? Who knows but the electors at a future period, in days of corruption may pick up a man's servant, a convict perhaps, and give him the dominion? Is any care taken that he shall be a man of perfect parts? Moses . . . precluded those labouring under any incapacity from entering the congregation of the Lord. Shall we in affairs of a civil nature, leave a door open to bastards, eunuchs, and the devil knows what?

*Id.* at 77.

stake, and much prejudice or willful misrepresentation to be encountered.<sup>66</sup>

Ridicule had its place even in serious debate.

That unenumerated rights were not at risk because they were protected by the spirit of the people and by the Constitution's grant of powers was a serious argument. Yet Federalists used burlesque illustrations to thrust this point home. By listing some of the rights Anti-Federalists were willing to leave unmentioned, Federalists suggested that the rights Anti-Federalists did mention were also unworthy of enumeration. As Iredell warned: "Let any one make what collection or enumeration of rights he pleases, I will immediately mention twenty or thirty more rights not contained in it."<sup>67</sup>

#### IV. CONCLUSION

Both Federalists and Anti-Federalists agreed that the rights of Americans were innumerable. In particular, they agreed that they had countless natural rights. The liberty of individuals in the state of nature—in the absence of government—included the right to eat, sleep, shave and do any number of other things of which human beings were capable, and most of this liberty was not to be surrendered to the federal government.

Therefore, any attempt to specify the rights retained by the people would, almost inevitably, specify too little. Even if the Constitution were to be the length of a book, it would not be long enough adequately to list rights. Consequently, when drafting the federal Constitution, Madison, Wilson and other Federalists preferred an enumeration of powers to an enumeration of rights. As James Wilson put it, "an omission in the enumeration of the powers of government is neither so dangerous, nor important, as an omission in the enumeration of the rights of the people." By enumerating federal powers rather than the rights reserved from the government, the framers and advocates of the Constitution could establish a general reservation of liberty. By specifying powers, they could generally reserve rights.

Yet Anti-Federalists insisted upon an enumeration of rights. Doubtful whether the people's virtue, the enumeration of powers,

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66 *Id.* at 76.

67 4 ELLIOT'S DEBATES, *supra* note 10, at 167 (statement of James Iredell at N.C. Rat. Convention, July 29, 1788).

or other restraints could limit the federal government, Anti-Federalists assumed that only such rights as were listed would really be protected from that government. Only the rights mentioned were certain of being preserved. Therefore, even if Federalist concerns about the enumeration of rights were justified, "half a loaf" was "better than no bread."

Of course, as the Federalists predicted, if some rights were to be listed, Americans would face problems with other, unenumerated rights. Federalists and even some Anti-Federalists were concerned about the fate of the unlisted rights, particularly the innumerable rights that were part of the undifferentiated natural liberty not sacrificed to the federal government. If, as in state constitutions, the rights retained were listed, was all other liberty impliedly sacrificed to the government? Would "everything that is not enumerated" be "presumed to be given"? To avoid this implied sacrifice of unenumerated rights, Madison proposed what became the Ninth Amendment, according to which the enumeration of rights was not to be construed to deny or disparage others retained by the people—the rights retained being those reserved by the enumeration of powers. Although many modern scholars have understood the unenumerated rights of the Ninth Amendment to be vague, unwritten rights, the unenumerated rights were none other than those reserved by the grant of powers in the U.S. Constitution.

Thus, the Constitution reserved rights in two diametrically opposite ways. By specifying powers, it reserved to the people the undifferentiated mass of liberty they did not grant to the federal government—a general reservation of rights confirmed and preserved through the Ninth Amendment. By specifying rights, the Constitution reserved some particular rights so that, for these, Americans would not have to rely merely upon the enumeration of powers. The distinct advantage of each method of reserving rights was repeatedly pointed out by its proponents. Federalists advocated the enumeration of powers as a means of protecting innumerable rights, and Anti-Federalists advocated the enumeration of rights as a means of removing any doubts about the protection of a very small number of rights.

If the Constitution was to have not only a general reservation of unenumerated rights but also a particularized reservation of specified rights, then it was necessary to determine which rights were to have that particularized protection. For Anti-Federalists, who had no confidence in either the virtue of the people or the



enumeration of powers as limitations on the federal government, there was every reason for a long list of rights, leading some Anti-Federalists to seek the enumeration of all rights not surrendered to government, "even every the most trivial." Most Anti-Federalists, however, recognized that only "important" or "essential" rights could be listed, and it was on the basis of this common assumption that Federalists could denounce the triviality of some of the proposals for a bill of rights.

To late-twentieth century scholars, the gleeful sarcasm of Federalists about trivial rights may seem undignified and callous. How could the founding fathers have been so indifferent to so many important rights, including many of the non-political rights that today are a matter of profound concern? The answer to this question reveals as much about us as about them—as much about our interpretation of the Constitution as about their drafting of it.

Today, in both practice and theory, we have largely abandoned one of the Constitution's two methods of reserving rights—the method that reserved the larger number of rights. Indeed, the general protection of unenumerated rights by means of the enumeration of powers has been so thoroughly undermined that many modern legal scholars may wonder how it could once have been taken seriously. The Constitution's enumeration of powers is hardly even discussed as a means of reserving rights, and we depend almost exclusively upon our Constitution's brief enumeration of rights.<sup>68</sup>

Our dependence upon a brief list of rights is one reason why unwritten constitutional protections for other rights may appear attractive and why the Federalist taunts about trivial rights may seem out of place. If we take for granted that the only protection for our rights was the Bill of Rights, the late-eighteenth century

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68 For some scholars who do address the role of the enumeration of powers, see *supra* note 8.

Of course, the enumeration of powers protected not only unenumerated rights but also, to some extent, rights that were listed. For example, it protected the press and, indeed, provided a rather different and in some ways more extensive protection for the press than did the First Amendment. For this reason, many early defenders of the press preferred to rely upon the enumeration of powers. See, e.g., HORTENTIUS [GEORGE HAY], AN ESSAY ON THE LIBERTY OF THE PRESS 5-32 (1799); TUNIS WORTMAN, A TREATISE CONCERNING POLITICAL ENQUIRY AND THE LIBERTY OF THE PRESS 207-32 (1800); Ky. Res. (Nov. 10, 1798), reprinted in THE VIRGINIA REPORT OF 1799-1800 162-63 (1850); see also Philip A. Hamburger, *Natural Rights and Positive Law: A Comment on Professor McAfee's Paper*, 16 S. ILL. U. L.J. 307, 310-11 (1992). Having abandoned the protection for the press provided by the enumeration of powers, courts have attempted to expand the protection for the press provided by the Bill of Rights.

discussions about trivial rights may give the impression that the framers and ratifiers of the Constitution and Bill of Rights were well aware of our myriad rights but callously omitted most of them as trivial.

Yet for the Federalists, who ratified the Constitution and to a considerable extent drafted the Bill of Rights, less was at stake than for the Anti-Federalists or for us. For most Federalists, the Bill of Rights was at best merely an additional, supplementary protection—not strictly necessary, except to reassure opponents of the Constitution that the rights they considered essential were not at risk. Even Madison said of his own proposal that it included some rights that were “rather unimportant.”<sup>69</sup> He defended the measure mainly on the ground that it would provide reassurance.<sup>70</sup> Thus, in 1789, when Federalists worried about which rights were to be included or excluded, and Sedgwick said that the right of assembly was as trivial as the right of wearing a hat, the question was not so much whether as how these rights would be protected. Would they be specifically reserved by enumeration? Or would they be reserved as part of the general, undifferentiated freedom defined by the enumeration of powers? In either case, they would be most substantially protected by the people’s spirit of liberty.

On account of the enumeration of powers and the people’s virtue or spirit of liberty, Federalists suspected that many of the rights Anti-Federalists wanted to have listed were unlikely to be infringed and in this sense were too trivial to be specified. These rights—like the rights of eating, of drinking and of sleeping in varied positions—were undoubtedly valuable. But they were “trivial” in the sense that they were not likely to be in danger. If Anti-Federalists were willing to allow the rights of eating and drinking to be unenumerated, why not also the freedom of the press? Precisely because the rights of eating and drinking were so important, Federalists went out of their way to use them as examples.

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69 CREATING THE BILL OF RIGHTS, *supra* note 1, at 80 (statement of James Madison, June 8, 1789). This was a common sentiment among Federalists. For example, George Washington wrote to Madison, “I see nothing exceptionable in the proposed amendments. Some of them, in my opinion, are importantly necessary, others, though in themselves (in my conception) not very essential, are necessary to quiet the fears of some respectable characters and well meaning Men.” Letter from George Washington to James Madison (ca. May 31, 1789), in 12 MADISON PAPERS, *supra* note 51, at 191.

70 CREATING THE BILL OF RIGHTS, *supra* note 1, at 80 (statement of James Madison, June 8, 1789).

Of course, Anti-Federalists distinguished the freedom of the press from the right to eat and thereby distinguished between the important and the trivial in a different way than did many Federalists. Whereas Federalists drew attention to the rights that were "trivial" in the sense that they were not likely to be infringed, Anti-Federalists emphasized the rights, so often attacked by government, that were essential for protecting other rights. These essential rights, they argued, required enumeration to preserve them from a government whose ill-defined powers would be interpreted expansively.

Anti-Federalists not only questioned the Constitution's method of reserving rights but also raised doubts about the various other, largely unwritten means by which Federalists hoped rights would be protected. In mocking trivial rights, Federalists focused on one of these unwritten means of protecting rights; they argued that the people's virtue or spirit of liberty rendered an enumeration of rights unimportant. Anti-Federalists, however, were loath to rely upon the people's virtue or sense of freedom. They demanded a bill of rights on the ground that political, cultural and other unwritten restraints would not remain efficacious against, or even survive under, the new government.

Moreover, some Anti-Federalists understood—what most Federalists refused to acknowledge—that a bill of rights could stimulate and reenforce the cultural and political restraints on government. According to some Anti-Federalists, a bill of rights might preserve essential rights from the federal government even as the people's virtue declined, for an enumeration of rights would, among other things, encourage a popular appreciation of the listed rights. It would "establish in the minds of the people truths and principles which they might never otherwise have thought of, or soon forgot. . . . What is the usefulness of a truth in theory, unless it exists constantly in the minds of the people . . . ?"<sup>71</sup> Drawing upon this sort of argument, Madison additionally justified a bill of rights as a means of discouraging a majority from acting oppressively through government: "The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest

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71 "Federal Farmer," January 20, 1788, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 29, at 324; *see also* "Cato" [George Clinton], *reprinted in* ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 266 (Paul L. Ford ed., 1892).

and passion."<sup>72</sup> Madison defended his amendments on the ground that "as they have a tendency to impress some degree of respect for them, to establish the public opinion in their favor, and rouse the attention of the whole community, it may be one means to controul the majority from those acts to which they might be otherwise inclined."<sup>73</sup>

Although these varied benefits of a bill of rights went unacknowledged by the Federalists who railed against the enumeration of trivia, and although we may be grateful that the Federalists eventually responded to the demands for a bill of rights, the abrasive Federalist banter about eating, sleeping and shaving remains a source of illumination. Notwithstanding that it was tendentious in its failure to acknowledge the truths espoused by opponents of the Constitution, the Federalist raillery was and still is a pointed reminder of other truths. It can remind us why the Constitution did not enumerate all of our rights and how, nonetheless, our unenumerated rights were to be protected. In this respect, trivial rights are not unimportant. As Hugh Henry Brackenridge wrote, "Ridicule is not the test of truth, but it may be employed to expose error, and on this occasion it seemed not amiss to use it a little . . . ."

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72 Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), in 11 MADISON PAPERS, *supra* note 51, at 298-99. This quotation was preceded by the following:

[I]n a popular Government, the political and physical power may be considered as vested in the same hands, that is in the majority of the people, and consequently the tyrannical will of the sovereign is not [to] be controuled by the dread of an appeal to any other force within the community. What use then it may be asked can a bill of rights serve in popular Governments? I answer the two following which though less essential than in other Governments, sufficiently recommend the precaution.

The quotation in the text continued:

2. Altho' it be generally true as above stated that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter sources; and on such, a bill of rights will be a good ground for an appeal to the sense of the community . . . ."

*Id.*

73 CREATING THE BILL OF RIGHTS, *supra* note 1, at 82 (statement of James Madison, June 8, 1789).



### Other Works by Philip A. Hamburger

*Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. (forthcoming 1994).

*Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907 (1993).

*Equality and Diversity: The Eighteenth-Century Debate About Equal Protection and Equal Civil Rights*, 1992 SUP. CT. REV. 295.

*A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915 (1992).

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